No. 86-228

In the Supreme Court of the United States

OCTOBER TERM, 1987

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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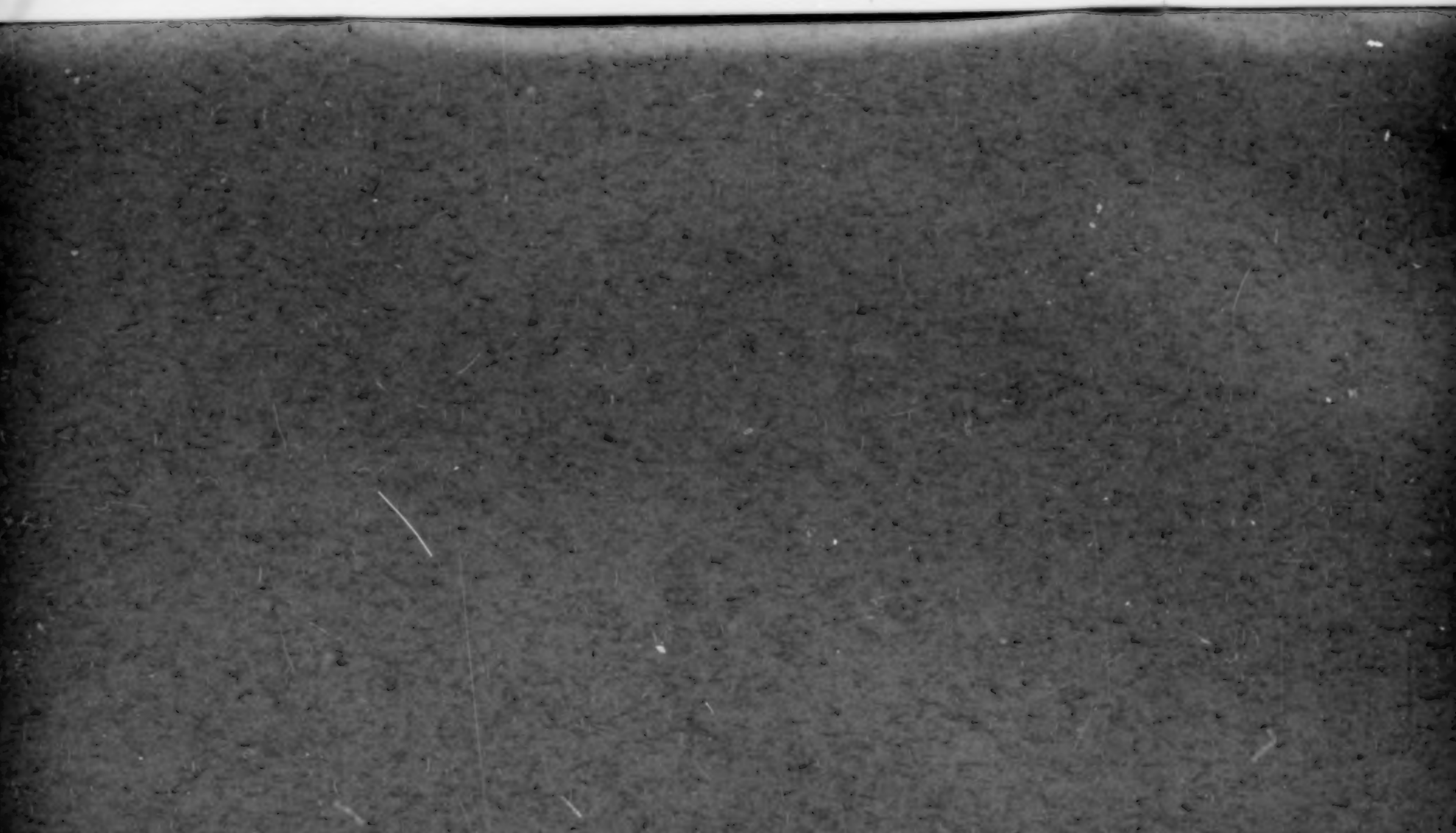

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INTRODUCTION AND SUMMARY OF ARGUMENT

On June 26, 1987, this Court restored the present case to the calendar for reargument and directed the parties to file supplemental briefs addressing the following questions:

> (1) Whether petitioner is subject to denaturalization for want of good moral character under 8 U.S.C. §§ 1451(a), 1427(a), and 1101(f)(6), with particular attention to:
>
> > (a) whether the "false testimony" provision of 8 U.S.C. § 1101(f)(6) should be interpreted to include a requirement that the false testimony concern a material fact;

(b) what standards should govern the determination under 8 U.S.C. § 1101(f)(6) whether "false testimony" has been given "for the purpose of obtaining any benefits under this chapter . . . ."; and

(c) whether the latter determination is one of law or fact.

(2)(a) Should the materiality standard articulated in *Chaunt* v. *United States*, 364 U.S. 350 (1960) be abandoned and, if so, what standard should govern the materiality inquiry under 8 U.S.C. § 1451(a); and

(b) is the determination of materiality under 8 U.S.C. § 1451(a) one of law or fact.

(3) When a misrepresentation has been established as "material" within the meaning of 8 U.S.C. § 1451(a), must any further showing be made to establish that citizenship was "procured by" that misrepresentation.

I. A person who obtains citizenship without possessing good moral character has "illegally procured" that citizenship and is subject to denaturalization (8 U.S.C. 1427(a), 1451(a)). Under 8 U.S.C. 1101(f), certain categories of individuals are precluded from claiming that they possess good moral character. The provision at issue in the present case, 8 U.S.C. 1101(f)(6), identifies one such category: persons who have "given false testimony for the purpose of obtaining any benefits under [the immigration laws]."

As the language of Section 1101(f)(6) reveals, there is no requirement that the false testimony be material. Nor is there any basis either in the history or purpose of Section 1101(f)(6) for courts to impose a materiality requirement. Even if, in hindsight, an applicant's false testimony turns out to be

immaterial, the fact remains that the applicant deliberately lied under oath to government officials for the purpose of obtaining benefits under the immigration laws. Such an applicant lacks good moral character.

Enforcing Section 1101(f)(6) as it was drafted does not mean that the government can freely obtain denaturalization of individuals for trivial misstatements or omissions. To begin with, the statute is limited to "testimony," *i.e.*, oral statements under oath. The statute does not reach other types of misrepresentations or concealments, such as falsified documents or statements not made under oath. Moreover, the declarant's purpose in lying must have been to obtain immigration benefits, and at the denaturalization stage, the government must prove by clear, unequivocal, and convincing evidence that the declarant gave the false testimony for that purpose.

If, despite the statutory language, the Court concludes that Section 1101(f)(6) must be read to contain a materiality requirement, we submit that the governing standard should be the one applicable under the perjury and false statement statutes, *i.e.*, whether the testimony had a natural tendency to influence, or was capable of influencing, the government official rendering the decision. A more exacting materiality standard would lead to the anomalous result that a person could be guilty of perjury yet still be viewed as possessing good moral character.

In determining whether someone has given false testimony in order to obtain immigration benefits, the trier of fact should consider all the relevant evidence in the case. The issues of whether the testimony is false and whether the declarant's purpose

was to obtain immigration benefits are factual in nature. However, the issue of whether the statements constitute "testimony" is one of law. Similarly, if Section 1101(f)(6) is interpreted to contain a materiality requirement, the issue of materiality is one of law.

In the present case, the government established (and the trial court found (Pet. App. 120a)) that petitioner gave false testimony for the purpose of obtaining immigration benefits. If materiality is required, we submit that petitioner's false testimony was material, for the reasons that we have previously explained (Gov't Br. 29-45).

II. In addition to the illegal procurement ground for denaturalization, a person is subject to denaturalization if he has made a material misrepresentation or concealed a material fact in the course of obtaining his citizenship (8 U.S.C. 1451(a)). The applicable materiality test, as announced in *Chaunt* v. *United States*, 364 U.S. 350 (1960), does not require the government to prove that the applicant misrepresented or concealed some fact that would have resulted in his disqualification.

While we agree with the conclusion in *Chaunt* that the government need not prove an ultimate disqualifying fact, we believe that the Court's formulation of the materiality standard in that case has led to unnecessary confusion. Accordingly, it is our submission that the Court should adopt the standard of materiality that has been applied in perjury and false statement cases. That inquiry, which is one of law, is straightforward and has proved easy to apply.

III. Under Section 1451(a), the government must prove that citizenship was "procured by" a misrepre-

sentation or concealment. In our view, that phrase is intended merely to make clear that the false statement must have been made during the application process. It should not be read to mean that "but for" the misstatement, the applicant would not have obtained citizenship. Such a reading would render the entire misrepresentation ground for denaturalization superfluous; if the government can prove a disqualifying fact, it has, by definition, established illegal procurement, and the misrepresentation would be irrelevant. Moreover, such an interpretation would wipe out over three decades of case law holding that, to denaturalize someone for a misrepresentation under Section 1451(a), the government need not prove an ultimate disqualifying fact.

ARGUMENT

I. PETITIONER IS SUBJECT TO DENATURALIZATION FOR WANT OF GOOD MORAL CHARACTER BECAUSE HE GAVE FALSE TESTIMONY FOR THE PURPOSE OF OBTAINING BENEFITS UNDER THE IMMIGRATION LAWS

A. Section 1101(f)(6) Contains No Materiality Requirement

1.a. Under 8 U.S.C. 1451(a), a person whose naturalization was "illegally procured" is subject to denaturalization.[1] A necessary prerequisite to naturalization is that the person be of good moral character

[1] Section 1451(a) also provides that a naturalized citizen is subject to denaturalization if his citizenship was "procured by concealment of a material fact or by willful misrepresentation." For simplicity, we refer to this alternative basis for denaturalization as "the misrepresentation clause of Section 1451(a)."

(8 U.S.C. 1427(a)). In 8 U.S.C. 1101(f), Congress set out minimum standards of "good moral character."[2] At issue in the present case is one such standard—that involving the duty to give truthful testimony to government officials. Under 8 U.S.C. 1101(f)(6), no person shall be deemed to be of good moral character if he "has given false testimony for the purpose of obtaining any benefits under this chapter[.]" Section 1101(f)(6), by its terms, contains no materiality requirement. All that is required is that there be false testimony and that such testimony be given with the intent to obtain benefits under the immigration laws.

The absence of a materiality requirement in Section 1101(f)(6) reflects Congress's special concern with the moral character of applicants for citizenship. Unlike the misrepresentation clause of Section 1451(a), which concerns itself with information-gathering (see generally *Chaunt* v. *United States*, 364 U.S. 350, 352-353 (1960)), Section 1101(f)(6) reflects Congress's view that a lack of good moral character is shown by the subjective intent to obtain immigration benefits through deception and dishonesty. The fact that, in hindsight, the misrepresentations may be found to pertain to matters that were not material does not erase the prior act of dishonesty. If the evidence indicates that the lies, even ultimately immaterial lies, were made with the specific intent to obtain immigration benefits, the individual

[2] For example, a person lacks good moral character if he is "a habitual drunkard" (Section 1101(f)(1)), if he "has been convicted of two or more gambling offenses committed during [the relevant] period" (Section 1101(f)(5)), and if "at any time [he] has been convicted of the crime of murder" (Section 1101(f)(8)).

who uttered those lies does not deserve the privilege of citizenship.

b. The legislative history of Section 1101(f)(6) is entirely consistent with the plain language of that provision. We have found nothing to suggest that, despite the wording of Section 1101(f)(6), Congress meant for that provision to apply only to "material" false testimony. To the contrary, the care and attention that Congress gave to the enumeration of the categories in Section 1101(f) suggests that it fully expected the courts to enforce the provisions of Section 1101(f) as written.

The requirement of good moral character has been a feature of the immigration laws for many years. See 8 U.S.C. (1940 ed.) 709(a) (requiring proof that "petitioner is and during all such [relevant] period has been a person of good moral character * * *"). In 1952, Congress rewrote the immigration laws, but it "carrie[d] forward the provision * * * that the petitioner for naturalization shall * * * have been a person of good moral character * * * ." H.R. Rep. 1365, 82d Cong., 2d Sess. 80 (1952). Unlike the House bill, the Senate bill provided for minimum standards of good moral character.[3] The conferees agreed to adopt the Senate provision. See H.R. Conf. Rep. 2096, 82d Cong., 2d Sess. 128 (1952) (Statement of the Managers on the Part of the House).

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[3] In so providing, the Senate was responding to the uncertainty surrounding the good moral character requirement in prior law. The Senate Report explained (S. Rep. 1137, 82d Cong., 2d Sess. Pt. 1, at 6 (1952)) that "[b]y providing who shall not be regarded as a person of good moral character, it is believed that a greater degree of uniformity will be obtained in the application of the 'good moral character' tests under the provisions of the bill."

Accordingly, Section 1101(f) lists several categories of prior conduct that require disqualification on moral character grounds. Any person who fits within any of eight enumerated categories may not be found to be a person of good moral character. Given this background, it would upset the purpose of Section 1101(f) for courts to tinker with the disqualifying provisions, for example, by reading a materiality requirement into Section 1101(f)(6). This point is underscored by the obvious inappropriateness of reading a materiality requirement into any of the other categories of Section 1101(f). For example, no one would seriously suggest that a person "convicted of two or more gambling offenses" (8 U.S.C. 1101(f)(5)) should be treated as having bad moral character only if the offenses in some way interfered with the administration of the immigration laws. Nor would it be appropriate for a court to limit that provision to "serious" gambling offenses. It likewise makes no sense to say that a person who has given false testimony for the purpose of obtaining benefits under the immigration laws should be treated as lacking good moral character only if his false testimony was material to his visa or citizenship application.

c. Consistent with the language and history of Section 1101(f)(6), several courts have ruled that, for purposes of naturalization proceedings, Section 1101(f)(6) contains no materiality requirement and that even immaterial testimony, if given with the intent to obtain immigration benefits, is sufficient to demonstrate a lack of good moral character. See, *e.g.*, *Kovacs* v. *United States*, 476 F.2d 843, 844-845 (2d Cir. 1973); *In re Haniatakis*, 376 F.2d 728, 730 (3d Cir. 1967) ("The statute is not concerned with

the significance or materiality of a particular question, but rather * * * intends that naturalization should be denied to one who gives false testimony."); *In re Zabala*, 573 F. Supp. 665, 668 (E.D.N.Y. 1983).

Despite the plain language of Section 1101(f)(6), however, both the Third Circuit (in the decision below (Pet. App. 23a-28a)) and the Tenth Circuit (*United States* v. *Sheshtawy*, 714 F.2d 1038 (1983)) have taken the position that, for purposes of denaturalization, Section 1101(f)(6) requires that the false testimony be material. In reaching that conclusion, those courts erred on two critical points.

First, the courts erroneously relied (Pet. App. 25a; 714 F.2d at 1041) on this Court's decision in *Fedorenko* v. *United States*, 449 U.S. 490 (1981), in which the Court construed Section 10 of the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1013 (DP Act).[4] The government conceded, and the Court agreed (*Fedorenko*, 449 U.S. at 507), that that provision is violated only by a material misrepresentation. But the provision at issue in *Fedorenko* is not one dealing with moral character. Rather, the breadth of Section 10 of the DP Act makes it more analogous to the misrepresentation clause of Section 1451(a), a provision that requires proof of materiality. See *Fedorenko*, 449 U.S. at 507-508 n.28 (relying on the misrepresentation clause of Section 1451(a) in construing Section 10 of the DP Act). As discussed above, false testimony given to obtain immigration benefits has particular relevance to the ques-

[4] Section 10 of the DP Act provided that any person who makes a willful misrepresentation in order to gain admission into the United States shall thereafter not be admissible (see *Fedorenko*, 449 U.S. at 507).

tion of moral character, even if such testimony is immaterial. The provision involved in *Fedorenko* is therefore not controlling on the construction of Section 1101(f)(6).

Second, the court below and the *Sheshtawy* court concluded that Section 1101(f)(6) could be read two different ways, depending on whether naturalization or denaturalization is at issue (Pet. App. 25a-26a; 714 F.2d at 1041 n.6). That result, however, cannot be correct; while the stage of the proceeding determines which side has the burden of proof,[5] it does not determine the substantive statutory requirements. See generally *Fedorenko*, 449 U.S. at 506 (citing authority for the proposition that the failure to meet the requirements for naturalization renders citizenship illegally procured and entitles the government to seek denaturalization).[6] Moreover, there is nothing in the text or history of the immigration statute to support a different reading of the requirements of Section 1101(f)(6) at different stages of the proceedings. Indeed, congressional action subsequent to the enactment of Section 1101(f) suggests that the opposite is true.

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[5] In applying for naturalization, the applicant bears the burden of proof (*e.g.*, *Berenyi* v. *District Director*, 385 U.S. 630, 637 (1967)), whereas in a denaturalization proceeding, the government bears the burden of proof and must meet that burden by clear, unequivocal, and convincing evidence (*e.g.*, *Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943)).

[6] Once again, the point is best illustrated by reference to other provisions of Section 1101(f). For example, it would plainly be incorrect to read Section 1101(f)(5)—which provides that someone with two gambling convictions during the relevant period lacks good moral character—to authorize denaturalization only if the citizen had at least four such convictions.

In 1961, Congress restored illegal procurement as a basis for denaturalization (Pub. L. No. 87-301, § 18, 75 Stat. 656 (amending 8 U.S.C. 1451(a)).[7] As the legislative history reveals, Congress was particularly concerned that individuals who lacked good moral character, and who therefore were ineligible for citizenship, were not subject to denaturalization because the government could not meet the requirements of the misrepresentation clause of Section 1451(a). See H.R. Rep. 1086, 87th Cong., 1st Sess. 39 (1961). The House Report noted (*ibid.*) that while Section 1101(f) "spells out in detail the type of conduct which precludes an alien from establishing good moral character," the requirement under the 1952 statute "that willful misrepresentation and so forth must be established render[ed] that section of the law inoperative, notwithstanding its clear and unmistakable purpose and intent." Accordingly, Congress restored illegal procurement as a basis for denaturalization for the specific purpose of enabling the government to proceed against individuals who lacked good moral character when they obtained their citizenship. Having concluded that the provisions of Section 1101(f) should provide a basis for denaturalization, Congress nowhere suggested that Section 1101(f)(6) should be treated differently from the other subsections of Section 1101(f) or that, for purposes of denaturalization, it should be read to reach only material false testimony. Had Congress intended to exclude Section 1101(f)(6) as a ground

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[7] Although illegal procurement existed as a ground for denaturalization prior to 1952, it was deleted when Congress passed the Immigration and Nationality Act of 1952, 8 U.S.C. (& Supp. III) 1101 *et seq.*

for proving illegal procurement, it could easily have done so.

d. The absence of a materiality requirement does not make every intentional misstatement to the immigration authorities a basis for subsequent denaturalization. By the same token, interpreting Section 1101(f)(6) not to require a showing of materiality does not conflict with this Court's decision in *Chaunt* v. *United States*, 364 U.S. 350 (1960).

The concerns addressed by Section 1101(f)(6) differ from those advanced by the misrepresentation clause of Section 1451(a); each provision therefore has distinct elements. While Section 1101(f)(6) does not contain a materiality requirement, it is substantially limited by the requirement of proof of intent: the misrepresentations must have been made "for the purpose of obtaining any benefits under [the immigration laws]." It is only dishonesty accompanied by this precise intent that Congress found morally unacceptable. Willful misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy, were not deemed sufficiently culpable to brand the applicant as someone who lacks good moral character. Moreover, the requirement of an intent to obtain immigration benefits imposes a heavy burden on the government at the denaturalization stage, since the government must prove its case by clear, unequivocal, and convincing evidence. It would be very difficult, for example, for the government to establish the requisite intent based on a single immaterial misrepresentation, at least in the absence of other evidence bearing on intent. On the other hand, in a case such as this one, where there has been a *pattern* of false testimony before the im-

migration authorities, the likelihood that the lies were made to obtain benefits under the immigration laws is much greater.

In contrast to Section 1101(f)(6), the misrepresentation clause of Section 1451(a) is concerned primarily with the accuracy and completeness of the information provided to immigration authorities; the purpose of the statute is to enable the authorities to ascertain the applicant's qualifications. See generally *Chaunt*, 364 U.S. at 352-353. The government's failure to learn of purely immaterial facts does not seriously impede its ability to rule on such applications. For that reason, unlike Section 1101(f)(6), the misrepresentation clause of Section 1451(a) requires that the false statements or concealments be material. On the other hand, the misrepresentation clause does not require that the applicant have the specific intent to obtain immigration benefits; instead, it requires merely that the misrepresentation or concealment be "willful" rather than inadvertent.

An additional distinction is that Section 1101(f)(6) applies only to false "testimony," whereas the misrepresentation clause of Section 1451(a) is more open-ended. Under the case law, "testimony" is limited to *oral* statements made under oath. See, *e.g.*, *Sharaiha* v. *Hoy*, 169 F. Supp. 598, 601 (S.D. Cal. 1959) (emphasis in original) (for purposes of Section 1101(f)(6), "*testimony*, technically construed, refers solely to the *oral* utterances of *witnesses* under oath"); *In re Ngan*, 10 I. & N. Dec. 725, 726 (1964) (testimony defined as oral statements under oath); *In re GLT*, 8 I. & N. Dec. 403, 404-405 (1959) (answers given under oath in a question-and-answer session in connection with an application for natural-

ization constitute testimony); *In re G*, 6 I. & N. Dec. 208 (1954) (document not subscribed to under oath is not testimony). See also *Ensign* v. *Pennsylvania*, 227 U.S. 592, 599 (1913) ("The word 'testimony' more properly refers to oral evidence."). Congress quite reasonably viewed false "testimony" as more indicative of bad moral character than other types of misrepresentations or omissions. "Testimony" is given under oath and is the product of face-to-face questioning by an official who can ascertain whether the applicant understands the questions.

Unlike Section 1101(f)(6), the misrepresentation clause of Section 1451(a) applies to concealments as well as misrepresentations, and is broad enough to include, inter alia, false applications and false unsworn oral statements. Again, the difference in the provisions reflects the difference in the purposes they serve: The objective of proper information-gathering is equally frustrated regardless of the form of the false statement or concealment.

2.a. Since the language of Section 1101(f)(6) is clear, and since the legislative history does not reflect a " 'clearly expressed legislative intention' contrary to that language," *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 10 n.12, this Court should not read a materiality requirement into that section. See *INS* v. *Hector*, No. 86-21 (Nov. 17, 1986) (relying on unambiguous statutory language and holding that court of appeals erred in interpreting the term "child" in the immigration statutes to include other close relatives, such as nieces); *INS* v. *Phinpathya*, 464 U.S. 183 (1984) (applying plain language of statute and holding that any break in requisite seven-year period of physical presence precludes alien from obtaining suspension of deporta-

tion); see generally *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6. If Congress decides that the effects of applying the statute as written are too harsh, it can modify the statute. See generally *Hector*, slip op. 6 n.7 (citing congressional enactment overruling *Phinpathya* and noting that "Congress has shown that it is willing to correct inequities that might result in [the Court's] applying the plain language of the suspension of deportation provision"). Indeed, in 1981 Congress amended Section 1101(f) to eliminate the provision that automatically classified someone who had engaged in adultery during the relevant period as lacking good moral character. Pub. L. No. 97-116, § 2(c)(1), 95 Stat. 1611.[8] Yet, notwithstanding the holdings in *Haniatakis* (in 1967) and *Kovacs* (in 1973) that Section 1101(f)(6) contains no materiality requirement, Congress has not amended Section 1101(f)(6) to add such a requirement. Because of Congress's "close * * * attention" to Section 1101(f), and its failure to amend Section 1101(f)(6), the courts should be "especially bound to pay heed to the plain mandate of the words Congress has chosen" (*Hector*, slip op. 5 n.6).

b. Under the proper interpretation of Section 1101(f)(6), petitioner is subject to denaturalization, and there is no need for this Court to remand the case for further findings. The trial court specifically found that when he applied for naturalization, peti-

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[8] Congress also amended Section 1101(f)(3), under which a drug offender cannot establish good moral character (see 8 U.S.C. 1182(a)(23)), to provide that simple possession of a small quantity of marijuana does not demonstrate a lack of good moral character. Pub. L. No. 97-116, § 2(c)(2), 95 Stat. 1611.

tioner submitted documents that falsely stated that he had not previously given false testimony to obtain benefits under the immigration laws (Pet. App. 120a).[9] While the documents themselves are not "testimony," the court's necessary underlying finding is that the oral statements petitioner made to the vice consul to obtain his visa [10] constituted false testimony to obtain benefits under the immigration laws.

Petitioner gave similar false testimony at the naturalization stage. As we have described (Gov't Br. 8), petitioner was interviewed under oath by the preliminary naturalization examiner and later by the naturalization examiner. As part of those interviews, he was required to verify each answer on his application for citizenship. Since his citizenship application contained a variety of false answers, his verifications under oath constituted false testimony. Moreover, there is no plausible explanation for petitioner's lies except his desire to hide something in his past that might have interfered with his ability to obtain citizenship.

Based on this pattern of false testimony that was given for the purpose of obtaining immigration benefits, petitioner lacked the requisite good moral character at the time he obtained his citizenship. He is therefore subject to denaturalization on that ground.

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[9] The court went on to find, however, that petitioner's false statements were not material (Pet. App. 122a-137a), and to hold that Section 1101(f)(6) requires proof of materiality (Pet. App. 123a).

[10] As we have indicated (Gov't Br. 7), the common practice at the time and place in question was that the vice consul interviewed visa applicants under oath and inquired into their biographical data.

3. If, despite the wording of Section 1101(f)(6), the Court concludes that a showing of materiality is required, we submit that the proper standard of materiality is the one that is applied in perjury cases.

a. There can be no reasonable dispute that a person who has committed perjury, as that offense is defined by statute,[11] is someone who lacks good moral character. See generally *In re Yao Quinn Lee*, 480 F.2d 673, 676-677 (2d Cir. 1973) (upholding denial of naturalization on ground that false statement by applicant that he was living with his wife demonstrated lack of good moral character); *Tieri* v. *INS*, 457 F.2d 391, 393 (2d Cir. 1972) (upholding denial of naturalization based on pattern of false testimony); *Ralich* v. *United States*, 185 F.2d 784, 788 (8th Cir. 1950) (commission of perjury demonstrates lack of good moral character); *In re Moy Wing Yin*, 167 F. Supp. 828, 830 (S.D.N.Y. 1958) (noting that perjury is a crime of moral turpitude). Therefore, no matter what standard of materiality this Court ultimately decides to adopt with respect to the misrepresentation clause of Section 1451(a) (see pages 22-30, *infra*), it cannot logically impose a higher standard than the criminal materiality standard in the context of Section 1101(f)(6). Otherwise, someone whose false testimony constitutes a serious federal offense could still be deemed a person of good moral character, an anomaly that Congress could not have intended.

The meaning of materiality in the criminal false statement statutes is clear and well settled. As we

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[11] *E.g.*, 18 U.S.C. 1001 (concealment of a "material fact" in a matter within the jurisdiction of a department or agency of the United States); 18 U.S.C. 1621 (false statement under oath as to a "material matter"); 18 U.S.C. 1623 (false "material declaration" before a court or grand jury).

have explained (Gov't Br. 25-27), those statutes do not require proof of an ultimate disqualifying fact, but instead require only that the government prove that the false statement had a natural tendency to influence, or was capable of influencing, the tribunal or government official. See, *e.g.*, *United States* v. *Lopez*, 728 F.2d 1359, 1362 (11th Cir.), cert. denied, 469 U.S. 828 (1984); *United States* v. *Ramos*, 725 F.2d 1322 (11th Cir. 1984); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979); *United States* v. *Gremillion*, 464 F.2d 901, 905 (5th Cir.), cert. denied, 409 U.S. 1085 (1972); *Robles* v. *United States*, 279 F.2d 401, 404 (9th Cir. 1960), cert. denied, 365 U.S. 836 (1961); *Carroll* v. *United States*, 16 F.2d 951, 953 (2d Cir.), cert. denied, 273 U.S. 763 (1927).

In *Berenyi* v. *District Director*, 385 U.S. 630 (1967), this Court strongly suggested that if materiality is required under Section 1101(f)(6)—an issue the Court did not decide—the standard is no more demanding than the perjury standard. In *Berenyi*, certain false testimony, given in the course of naturalization, was found to be material, even though it almost certainly could not have satisfied any materiality standard higher than the perjury standard. The petitioner in *Berenyi* had answered "No" to the question whether he had ever "been a member of, or in any other way connected with, * * * the Communist Party * * *" (385 U.S. at 633). The district court found, contrary to the petitioner's testimony, that he had been associated with the Communist Party before applying for citizenship. This Court was willing to assume, for the purposes of analysis, that his membership would not have made him ineligible for citizenship because he was not "meaningfully associated" with that organization

(*id.* at 638). Nonetheless, the false testimony was found to be material because it could have affected the government's investigation. The Court stated that "the broader question asked of the petitioner was certainly material and relevant," and it noted that "[t]he Government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so that it may pursue leads and make further investigation if doubts are raised" (*ibid.*). The Court's language in *Berenyi* is identical to the materiality standard applied in the perjury context.

b. Under the perjury standard, petitioner's pattern of false testimony was material. The matters on which he testified falsely certainly fell within the ambit of those as to which the government has a right to true information "so that it may pursue leads and make further investigation if doubts are raised" (*Berenyi*, 385 U.S. at 638). Additionally, as we have explained (Gov't Br. 29-34), in light of petitioner's submission of false documents, an investigation would have followed (or his application would have been denied outright even without an investigation) if petitioner had told the truth at any stage of the visa or citizenship process. Under those circumstances, the false testimony was plainly capable of influencing the decisionmaker.

B. The Determination Whether "False Testimony" Has Been Given "For The Purpose Of Obtaining Any Benefits Under This Chapter" Should Be Governed By The Usual Standards of Proof In Immigration Cases

In making the determinations necessary under Section 1101(f)(6), the trial court should consider all information relevant to the inquiry. In deciding whether the testimony was false, it should evaluate

the testimonial, documentary, and physical evidence presented by both sides, attaching appropriate weight according to the circumstances. Similarly, in deciding whether false testimony was given with an intent to obtain immigration benefits, it should consider, among other things, the credibility of an applicant's explanation of his intent, whether the misrepresentations were the sort one might make in an attempt to gain benefits, whether there was a pattern of false testimony or merely an isolated incident, whether the applicant told the truth to other persons at other times, and any other inculpatory or exculpatory evidence. The materiality of the misrepresentations could also be highly probative of an intent to obtain immigration benefits. In short, since factual determinations are inevitably ad hoc, the trial court should be given great flexibility in weighing and considering all of the evidence.

Of course, the trial court must evaluate the evidence in light of the applicable burden of proof. When the issue is whether an alien's false testimony should disqualify him from obtaining citizenship, the burden of proof is on the alien, and all doubts should be resolved against him. *Berenyi*, 385 U.S. at 636-637. On the other hand, when the issue is whether a naturalized citizen should be denaturalized because of his prior false testimony, the burden of proof is on the government, and the government's evidence must be clear, unequivocal, and convincing, and not leave "the issue in doubt." *Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943).

C. The Determination Whether "False Testimony" Has Been Given "For The Purpose Of Obtaining Any Benefits Under This Chapter" Is Partly One of Fact And Partly One Of Law

Under Section 1101(f)(6), the court must determine whether the testimony in question was false. Moreover, it must decide whether the applicant gave the false testimony with the intent to obtain immigration benefits. Those inquiries involve purely factual issues. See generally *Pullman-Standard* v. *Swint*, 456 U.S. 273, 288 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace."); *Berenyi*, 385 U.S. at 634-635. The court must also determine whether in fact "testimony" is involved. When a dispute arises whether a particular statement constitutes "testimony," the issue is one of law.

If Section 1101(f)(6) requires that the false testimony be material, it is our view that the issue of materiality is one of law. Most courts have so held in the perjury context,[12] and there is no reason for a different approach here.

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[12] See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962); *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929) ("the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court"); *United States* v. *Corsino*, 812 F.2d 26, 30-31 (1st Cir. 1987); *United States* v. *Greber*, 760 F.2d 68, 69 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985); *United States* v. *Bridges*, 717 F.2d 1444, 1448 & n.18 (D.C. Cir. 1983) (citing cases for what court characterized as the "unanimous verdict of the federal courts"), cert. denied, 465 U.S. 1036 (1984); *United States* v. *Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980); *United States* v. *Richardson*, 596 F.2d 157, 165 (6th Cir. 1979); but see *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981) (stating that materiality is fact question for jury), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979) (same).

II. THE OVERALL APPROACH TO MATERIALITY IN *CHAUNT* v. *UNITED STATES* IS CORRECT, BUT THE STANDARD ADOPTED IN THAT CASE SHOULD BE SIMPLIFIED

A. The *Chaunt* Court Correctly Concluded That The Government Is Not Required To Prove An Ultimate Disqualifying Fact In Order To Establish Materiality

The leading case on materiality under the misrepresentation clause of Section 1451(a) is *Chaunt* v. *United States*, 364 U.S. 350 (1960). In *Chaunt*, the Court concluded that the naturalized citizen's nondisclosures were not material because the government had failed to show "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (*id.* at 355). As we have previously explained (Gov't Br. 20-21), it is our submission that the Court in *Chaunt* established two alternative tests for determining the materiality of misrepresentations or concealments, and that proof of disqualifying facts is not required under the second test.

1. Prior to *Chaunt*, it was well established that proof of an ultimate disqualifying fact was not required to establish the materiality of a false statement under the misrepresentation clause of Section 1451(a). See, *e.g.*, *United States* v. *Montalbano*, 236 F.2d 757, 759-760 (3d Cir.), cert. denied, 352 U.S. 952 (1956); *Corrado* v. *United States*, 227 F.2d 780 (6th Cir. 1955), cert. denied, 351 U.S. 925 (1956);

Granduxe y Marino v. *Murff*, 183 F. Supp. 565, 567 (S.D.N.Y. 1959), aff'd, 278 F.2d 330 (2d Cir.), cert. denied, 364 U.S. 824 (1960); *United States* v. *Chandler*, 152 F. Supp. 169, 177 (D. Md. 1957); *United States* v. *Lumantes*, 139 F. Supp. 574, 575 (N.D. Cal. 1955), aff'd, 232 F.2d 216 (9th Cir. 1956). The Court in *Chaunt* did not state or imply that it intended to depart from this established line of cases. To the contrary, the language used by the Court in *Chaunt* is fully consistent with the prior authority.[13] The Court's reference to whether the true facts "might" have been useful in an investigation "possibly" leading to the discovery of disqualifying facts (364 U.S. at 355) strongly suggests that proof of an ultimate disqualifying fact is not required.[14] Cf. *Costello* v. *United States*, 365 U.S. 265, 270 (1961) (emphasis added) (upholding denaturalization of a person who concealed occupation as a bootlegger on the ground that "[i]n 1925 a known bootlegger would *probably* not have been admitted to citizenship"). Indeed, most of the lower court decisions since *Chaunt* have agreed with us that, under the *Chaunt* materiality standard, the government need not establish an ultimate disqualifying fact in order

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[13] The Court's statement of the materiality test was articulated, without elaboration, in a single sentence at the conclusion of its analysis of why Chaunt's misstatements were not material (364 U.S. at 354). We do not believe that the Court would have rejected, in such a casual and offhand manner, the approach consistently employed by lower courts throughout the country.

[14] Petitioner himself appears to concede (Pet. 8; Oral Arg. Tr. 4) that the literal language of *Chaunt* supports the government's position.

for a misrepresentation to be material. See, *e.g.*, *United States* v. *Palciauskas*, 734 F.2d 625 (11th Cir. 1984); *United States* v. *Koziy*, 728 F.2d 1314, 1320 (11th Cir.), cert. denied, 469 U.S. 835 (1984); *Kassab* v. *INS*, 364 F.2d 806 (6th Cir. 1966); *United States* v. *Oddo*, 314 F.2d 115, 118 (2d Cir.), cert. denied, 375 U.S. 833 (1963); *Langhammer* v. *Hamilton*, 295 F.2d 642, 648 (1st Cir. 1961). Contra, *United States* v. *Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983); see also *La Madrid-Peraza* v. *INS*, 492 F.2d 1297 (9th Cir. 1974).

2. Petitioner's view—that the government must establish an ultimate disqualifying fact under either *Chaunt* test (Pet. Br. 9-20)—is contrary to the language, history, and purposes of 8 U.S.C. 1451(a), as we have previously explained (Gov't Br. 23-28). By requiring proof of an ultimate disqualifying fact, petitioner's standard in essence requires proof of illegal procurement in every denaturalization case. Thus, even though illegal procurement and misrepresentation are separate and distinct grounds for revoking citizenship, petitioner's approach would render the misrepresentation portion of Section 1451(a) wholly redundant. It is highly unlikely that Congress would have drafted the statute with two disqualification provisions if it had intended only one of them to have any effect.

Moreover, under petitioner's approach to materiality, the Court would be forced to disregard the well-accepted meaning of the term "material," in violation of the principle that when Congress does not define a statutory term, that term should be given its ordinary meaning. See, *e.g.*, *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981). In various other areas of law, the concept of materiality has been ap-

plied in a manner consistent with the literal language of *Chaunt*.

For instance, as we have noted, the perjury and false statement statutes do not require proof of an ultimate disqualifying fact, but instead require only that the government show that the statement had a natural tendency to influence, or was capable of influencing, the tribunal or government official. Similarly, in the securities field, a fact omitted from a proxy statement is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976). The securities materiality standard "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote" (*ibid.*). See also Note, *Misrepresentation and Materiality in Immigration Law—Scouring the Melting Pot*, 48 Fordham L. Rev. 471, 479-480 & nn.67-70 (1980) (citing authorities in contract and tort law for the proposition that materiality does not require that the injured party's decision would have been altered, but only that the true fact would have been important to the decisionmaking process). Absent some indication by Congress of an intent to adopt a different materiality standard here—and we have found none—there is no basis for petitioner's proposed standard, which requires that the Court disregard the well-settled meaning of materiality in other contexts.

Finally, as we have explained (Gov't Br. 22-23), a requirement that the government establish an ultimate disqualifying fact would have serious adverse policy implications. An applicant for a visa or for citizenship would have every incentive to lie whenever he believed that the truth might affect his appli-

cation. Even if his lie were eventually discovered, which it might not be, the applicant would be better off because (1) the passage of time makes it more difficult for the government to establish an ultimate disqualifying fact, and (2) the burden shifts from the applicant (to prove eligibility for citizenship) to the government (to establish ineligibility by clear, unequivocal, and convincing evidence). As this Court recognized in *Chaunt* (364 U.S. at 352), "[f]ull and truthful response to all relevant questions required by the naturalization procedure is * * * to be exacted, and temporizing with the truth must be vigorously discouraged." Petitioner's proposed standard would defeat this important objective by inviting deceit.

In sum, this Court should reaffirm its conclusion in *Chaunt* that the government need not prove an ultimate disqualifying fact in order to establish materiality.

B. The Court Should Simplify The Materiality Standard Announced In *Chaunt* By Adopting The Standard Applicable In Perjury And False Statement Cases

1. While we submit that the Court in *Chaunt* was correct in not requiring the government to prove an ultimate disqualifying fact, we also believe that the Court's formulation of the materiality test has led to unnecessary confusion. Under our reading of the second *Chaunt* test, materiality is established if the government can show that, if the truth had been revealed, there *would* have been an investigation that *might* have uncovered disqualifying facts. See Gov't Br. 20-22; *Fedorenko*, 449 U.S. at 528 (White, J., dissenting) (stating that the "would/might" test is the proper one); *United States* v. *Fedorenko*, 597

F.2d 946 (5th Cir. 1979) (same), aff'd on other grounds, 449 U.S. 490 (1981); *United States* v. *Oddo*, 314 F.2d 115, 118 (2d Cir.) (same), cert. denied, 375 U.S. 833 (1963); see also 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 20.4b, at 20-14 (1986) (interpreting *Chaunt* as adopting a "would/might" test); Appleman, *Misrepresentation in Immigration Law: Materiality*, 22 Fed. B.J. 267, 271-272 (1962) (same). Other courts, however, have reached different conclusions. Thus, the court below construed *Chaunt* to require a showing that there would have been an investigation that "*probably* would have led to the discovery of disqualifying facts" (Pet. App. 22a (emphasis in original)).[15] The standard applied by the court below had previously been adopted by the Second Circuit in the deportation context. See *Maikovskis* v. *INS*, 773 F.2d 435, 442 (1985), cert. denied, No. 85-1483 (June 16, 1986). The Sixth Circuit has adopted a "might/might" standard, *i.e.*, whether disclosure of the true facts "*might* have led to further action and the discovery of facts which would have justified the refusal of the visa." *Kassab* v. *INS*, 364 F.2d 806, 807 (1966) (emphasis in original; citations omitted). In the Tenth Circuit, the test is whether there *would* have been an investigation that *would* have led to the discovery of a disqualifying

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[15] The court left open the question "whether the materiality test under *Chaunt* is satisfied under the *possibly* standard, *i.e.*, whether the government need only show that the truth at the time of the application would have prompted an investigation and that such investigation would have *possibly* revealed the facts which would have made the applicant ineligible" (Pet. App. 22a (emphasis in original)).

fact. *United States* v. *Sheshtawy*, 714 F.2d 1038, 1040-1041 (1983).[16]

These various tests all represent efforts to interpret the materiality language used by the Court in *Chaunt*. While the approaches differ significantly, none of them has the virtue of simplicity. Rather, under any of these interpretations, the denaturalization court is still forced to apply two distinct tests and, under the second test, to consider two separate issues.

As we suggested at oral argument (Oral Arg. Tr. 48-49), this Court could eliminate the confusion arising from *Chaunt* by substituting for the two-part formulation the test that is applied in perjury and false statement cases, *i.e.*, whether the false statement had a natural tendency to influence, or was capable of influencing, the tribunal or governmental official.[17] This test has proved workable and easy to apply. It would substitute one simple inquiry for the multiple issues that must be resolved under the *Chaunt* formulation. Furthermore, the criminal standard is more faithful to Congress's intent. Since Congress did not define materiality, it is more in

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[16] The three Justices in *Fedorenko* who offered their views on *Chaunt* gave three different interpretations of the materiality test. See Gov't Br. 21 n.21 (describing positions taken by Justices Blackmun, Stevens, and White).

[17] A similar approach was recently taken by the Eleventh Circuit in the context of a forfeiture proceeding based on visa fraud. See *United States* v. *One Lear Jet*, 808 F.2d 765, 772-773 (1987) ("misrepresentations are material if they could have had a significant impact on the decision making process of the immigration official authorized to grant or deny the visa"), petition for cert. pending, No. 86-1725.

keeping with Congress's intent to look to the settled meaning of the term rather than to formulate a new, multi-layered definition, as the Court did in *Chaunt*.

This Court would not need to overrule *Chaunt* in order to adopt the criminal standard. While the two standards are characterized in different terms, they are not fundamentally different. Both focus principal attention on whether the information would be important to the decisionmaker. And neither one requires proof of an ultimate disqualifying fact. Although the criminal standard does not refer explicitly to the ultimate disposition of the inquiry in question, a fact ordinarily would not be capable of influencing a decisionmaker unless it related, at least indirectly, to an applicant's qualifications for a visa or citizenship.

To the extent that the *Chaunt* test, as applied by lower courts, would in some cases yield different outcomes than would the perjury materiality standard, we do not believe that that result was intended by Congress or by the *Chaunt* Court itself. As we understand *Chaunt*, this Court did not mean to redefine materiality to give it a special and distinct meaning in denaturalization cases. Rather, the Court appears simply to have been applying existing materiality concepts, while using language applicable to the immigration and naturalization context. There is certainly no basis in *Chaunt* for the conclusion that the Court intended to adopt a more exacting materiality standard for denaturalization cases than for criminal cases.

2. Our submission that the Court should adopt the criminal standard also resolves the Court's question whether the issue of materiality is one of fact or

law. As we noted above, in the perjury and false statement context it is well established that the issue of materiality is one of law.[18]

III. THE REQUIREMENT THAT CITIZENSHIP BE "PROCURED BY" A MATERIAL MISREPRESENTATION UNDER SECTION 1451(a) SIMPLY MAKES CLEAR THAT THE MISREPRESENTATION MUST HAVE BEEN MADE IN THE COURSE OF THE VISA OR NATURALIZATION PROCEEDINGS

In addition to authorizing denaturalization for illegal procurement, Section 1451(a) also provides for the denaturalization of any person whose citizenship was "procured by concealment of a material fact or by willful misrepresentation * * *." In our view, the phrase "procured by" in the statute is intended only to draw a connection between the misstatement and the application for naturalization. Naturalization is "procured by" a misrepresentation if the applicant successfully obtains his naturalization as the result of an application process in which he made material misrepresentations.[19] Congress could have

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[18] As we explained above, the government's evidence established materiality under the criminal standard. Moreover, while we believe that the criminal standard would be easier to administer, we continue to submit that the government's evidence was sufficient under any of the existing *Chaunt* formulations (see Gov't Br. 29-45).

[19] The concept of "procuring" citizenship is not new to the current statute. It first appeared in the Act of June 29, 1906, ch. 3592, § 15, 34 Stat. 601, which authorized federal prosecutors to institute denaturalization proceedings on the ground of fraud or illegal procurement and provided that "the party holding the certificate of citizenship alleged to have been *fraudulently or illegally procured* shall have sixty days personal notice in which to make answer * * *" (emphasis added). See also Nationality Act of 1940, ch. 876, § 340, 54 Stat. 1160

provided for the denaturalization of anyone who "obtained citizenship after concealing a material fact or making a willful misrepresentation in the process of procuring a visa or citizenship." It chose the shorter, albeit less precise, formulation now embodied in the statute, but the meaning is the same: the material misstatements or concealments must have been made during the process of applying for a visa or naturalization.

It is possible to argue that the phrase "procured by," when viewed in isolation, imposes a "but for" test of causation whereby denaturalization is authorized only if the applicant definitely would have been denied citizenship had the true facts been disclosed. To our knowledge, however, no court has adopted such an interpretation of that phrase,[20] and we submit that such a reading would be erroneous.

Interpreting the phrase "procured by" as establishing a "but for" requirement of causation would make several important portions of Section 1451(a) redundant, including the very clause in which the

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(Commissioner of Immigration and Naturalization authorized to cancel any certificate of citizenship that was "illegally or fraudulently obtained").

[20] Even the Tenth Circuit in *Sheshtawy*, which held that proof of an ultimate disqualifying fact is required, did not rely on the "procured by" language; it relied instead on *Chaunt* and the concept of materiality (see 714 F.2d 1039-1041).

In *Chaunt*, the petitioner relied on the "procured by" language and argued that "[t]he concealment or misrepresentation, therefore, must have made the difference between obtaining naturalization and not obtaining it" (Chaunt Br. 11). This Court did not address that argument in its opinion, and instead resolved the case on the narrower ground of materiality.

words appear. Moreover, it would seriously impair the objective of obtaining true information from citizenship applicants. The ramifications are so far-reaching that the interpretation cannot be the one that Congress intended.

If "procured by" meant "caused by," the word "material" in Section 1451(a) would be redundant. That is, if citizenship would not have been awarded had the true facts been known, then the misrepresentation or concealment is material under any conceivable definition.[21] Under such an interpretation, there would have been no need for Congress to use the word "material" in the misrepresentation clause of Section 1451(a).

In addition, reading the words "procured by" as establishing a "but for" requirement would render the entire misrepresentation clause of Section 1451(a) unnecessary, since the other part of that section, which deals with "illegal procurement," would be dispositive in every case in which the requirements of the misrepresentation clause could be satisfied. Put another way, interpreting "procured by" as requiring causation would compel the government to prove illegal procurement in every case. Congress could not have intended, through the use of the phrase "procured by," to render the entire misrepresentation clause of Section 1451(a) meaningless.

Furthermore, reading "procured by" as a requirement of causation would make Section 1451(a) a license to lie rather than a deterrent against dishon-

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[21] Indeed, a "but for" requirement would go beyond proof of an ultimate disqualifying fact. The government would also have to show that it would have realized that the facts were disqualifying at the time and that it would have acted upon those facts to disqualify the applicant.

esty. If an applicant can be denaturalized only for false statements that would necessarily have caused his rejection in the first instance, he has no incentive to tell the truth. The applicant cannot be worse off for making misstatements or concealing facts if he can be denaturalized only if he would have been denied citizenship had he told the truth. As we explained above, if the government must prove an ultimate disqualifying fact, an applicant will have an affirmative incentive to lie.

In sum, the interpretation of "procured by" as a "but for" requirement of causation would lead to absurd results. Important parts of Section 1451(a) would be redundant, and the purpose and function of the misrepresentation clause of Section 1451(a) would be negated. For those reasons, it is not surprising that apparently no court has construed the phrase "procured by" to incorporate a "but for" causation requirement. In response to the Court's question, we submit therefore that, when a misrepresentation has been established as "material" within the meaning of 8 U.S.C. 1451(a), the government can show that citizenship was "procured by" that misrepresentation if it shows that the material misrepresentation was made as part of the process leading to the obtaining of citizenship.

CONCLUSION

For the foregoing reasons and those stated in our initial brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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